

HALF A LOAF MIGHT SUFFICE: FBARS, FLORA AND FEDERAL JURISDICTION

Posted on **February 13, 2017** by **Jim Malone**



Jack Townsend's excellent blog [Tax Crimes covered an interesting](#) case that involved an attempt to challenge a penalty under the Bank Secrecy Act (the "Act"), *Kentera v. United States*, No. 16-cv-1020-JPS, 2017 U.S. Dist. LEXIS 12450 (E.D. Wisc. Jan. 30, 2017). The Kenteras sought to challenge penalty assessments issued because they failed to file a Report of Foreign Bank and Financial Accounts, which is known as an FBAR, for several years. The FBAR reporting obligation is imposed under the Act. See 31 U.S.C. § 5314. The Kenteras were subjected to a series of penalty assessments for a series of violations; the largest penalty assessment for any year was \$10,000, which is the ceiling for non-willful violations. 2017 U.S. Dist. LEXIS 12450 at *5-*6. Mrs. Kentera was assessed a total of \$10,500 and Mr. Kentera was assessed a total of \$40,500. *Id.*

Rather than challenging the penalties through a refund claim, the Kenteras attempted a challenge under the Administrative Procedures Act. *Id.* at *1. The government moved to dismiss, arguing that there was no applicable waiver of sovereign immunity. *Id.* at *1-*2. One aspect of the court's disposition of the motion was particularly interesting: In addressing whether the Kenteras had an adequate remedy elsewhere, the court observed that "[i]n the government's view, Plaintiffs can pay *some or all of the penalties* and then file a refund suit under the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346(a)(2)." 2017 U.S. Dist. LEXIS 12450 at *8-*9 (emphasis supplied).

The concession by the government that a refund case could be pursued without full payment is a helpful reminder that the familiar rules associated with tax refund claims do not apply to FBAR penalties because they don't arise under the Internal Revenue Code.

To review, tax refund claims are subject to the full payment rule of *Flora v. United States*, 362 U.S. 145, 150-51 (1960), which is rooted in the language of 28 U.S.C. § 1346(a)(1). While there is an exception to *Flora* where a tax is divisible, such as an excise tax, that exception is narrow. For example, the government has successfully argued that penalties assessed for failure to register a tax shelter are not divisible because they arise from a single failure to act. See *Diversified Grp. Inc. v. United States*, 841 F.3d 975, 981-84 (Fed. Cir. 2016); see also *Larson v. United States*, No. 16-cv-00245 (VEC), 2016 U.S. Dist. LEXIS 179314 (S.D.N.Y. Dec. 28, 2016).

Flora's full payment rule is based on the language of 28 U.S.C. § 1346(a)(1), which provides a district court with jurisdiction in the following types of cases:

Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

28 U.S.C. § 1346(a)(1). In *Flora*, the Supreme Court concluded that the phrase “any internal-revenue tax” should be given “its more natural reading—the full tax.” 362 U.S. at 150.

The Tucker Act provides the Court of Federal Claims with jurisdiction over the following cases:

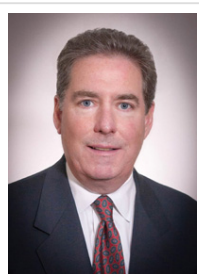
The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Since it is not tied to the payment of a tax (or of a penalty), it is certainly plausible that the Court of Federal Claims would have jurisdiction over a claim for a refund where a tax or a penalty was only partially paid.

Despite the broader language of the Tucker Act, the Court of Federal Claims has routinely applied *Flora* to tax refund cases because the jurisdictional grant to the Court of Claims for tax refund cases is concurrent with that of the district courts. See 28 U.S.C. § 1346(a)(1); see also *Rocovich v. United States*, 933 F.2d 991, 993-94 (Fed. Cir. 1991). Consequently, when the Federal Circuit addressed a penalty assessed under the Internal Revenue Code in *Diversified Group*, there was little doubt that *Flora* applied. See *Diversified Grp.*, 841 F.3d at 981-82.

The FBAR penalty, in contrast, is imposed under the Act, not the Code. As a consequence, to the extent that the Court of Federal Claims has jurisdiction over FBAR penalties, the full payment rule of *Flora* should not apply. See *Kentera*, 2017 U.S. Dist. LEXIS 12450 at *10-*14. The Court of Federal Claims has previously held that it has jurisdiction over FBAR penalties. See *Norman v. United States*, 126 Fed. Cl. 277, 278-81, 2016 U.S. Claims LEXIS 288 (2016). While the government argued in *Norman* that FBAR challenges must be brought in district court under 28 U.S.C. § 1355(a), the Court of Claims rejected that position in a well-reasoned opinion.

As a consequence, it appears that partial payment of an FBAR penalty may just be enough to create jurisdiction over the penalty determination. That’s important because willful FBAR penalties can be very substantial; the ceiling is the greater of \$100,000 or 50% of the account balance. 31 U.S.C. § 5321(a)(5) (C)(i), (D)(ii).



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